(2)

FILED
NOV 12 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-419

In the Supreme Court of the United States

OCTOBER TERM, 1998

CHARLES SIMPSON CHRISTOPHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

JAMES K. ROBINSON
Assistant Attorney General

LISA SIMOTAS
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the wire fraud statute requires that a defendant's misrepresentations be made to the same party from whom money or property is obtained.

2. Whether petitioner's scheme to acquire two insurance companies by means of false representations and promises, in order to enable petitioner to loot the companies' assets, constituted a scheme to defraud the companies of money or property within the meaning of *McNally* v. *United States*, 483 U.S. 350 (1987).

3. Whether, in addition to instructing the jury that it must find that petitioner acted knowingly and with specific intent to defraud in order to return a guilty verdict, the district court was required to give petitioner's requested instruction that good-faith reliance on the advice of counsel is a defense to the charges against him.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	10
Conclusion	24

TABLE OF AUTHORITIES

Cases:

Carpenter v. *United States*, 484 U.S. 19 (1987)	10
Cheek v. *United States*, 498 U.S. 192 (1991)	17
Corcoran v. *American Plan Corp.*, 886 F.2d 16 (2d Cir. 1989)	11
Cupp v. *Naughten*, 414 U.S. 141 (1973)	17
Estelle v. *McGuire*, 502 U.S. 62 (1991)	17
Liss v. *United States*, 915 F.2d 287 (7th Cir. 1990)	22
Mathews v. *United States*, 485 U.S. 58 (1988)	16, 22
McNally v. *United States*, 483 U.S. 350 (1987)	9, 11, 12, 13, 14, 15, 16
United States v. *Blumeyer*, 114 F.3d 758 (8th Cir.), cert. denied, 118 S. Ct. 350 (1997)	10
United States v. *Brimberry*, 961 F.2d 1286 (7th Cir. 1992)	19, 20
United States v. *Brumley*, 116 F.3d 728 (5th Cir.), cert. denied, 118 S. Ct. 625 (1997)	14
United States v. *Bucuvalas*, 970 F.2d 937 (1st Cir. 1992), cert. denied, 507 U.S. 959 (1993)	8
United States v. *Casperson*, 773 F.2d 216 (8th Cir. 1985)	20
United States v. *Cheek*, 3 F.3d 1057 (7th Cir. 1993), cert. denied, 510 U.S. 1112 (1994)	20
United States v. *Cosentino*, 869 F.2d 301 (7th Cir.), cert. denied, 492 U.S. 908 (1989)	10

Cases—Continued: Page

United States v. *DeFries*, 129 F.3d 1293 (D.C. Cir. 1997) 21
United States v. *Dockray*, 943 F.2d 152 (1st Cir. 1991) 18
United States v. *Dorotich*, 900 F.2d 192 (9th Cir. 1990) 19
United States v. *Duncan*, 850 F.2d 1104 (6th Cir. 1988) 19
United States v. *Eisen*, 974 F.2d 246 (2d Cir. 1992), cert. denied, 507 U.S. 998 (1993) 11
United States v. *Evans*, 844 F.2d 36 (2d Cir. 1988) 11
United States v. *Fowler*, 932 F.2d 306 (4th Cir. 1991) 19
United States v. *Frost*, 125 F.3d 346 (6th Cir. 1997), cert. denied, No. 97-1549 (Oct. 5, 1998) 11, 14
United States v. *Gambler*, 662 F.2d 834 (D.C. Cir. 1981) 19, 21
United States v. *Gross*, 961 F.2d 1097 (3d Cir.), cert. denied, 506 U.S. 965 (1992) 19
United States v. *Hopkins*, 744 F.2d 716 (10th Cir. 1984) 21, 22
United States v. *Kelley*, 864 F.2d 569 (7th Cir.), cert. denied, 493 U.S. 811 (1989) 20
United States v. *Lew*, 875 F.2d 219 (9th Cir. 1989) 10, 11, 12, 14
United States v. *Mankarious*, 151 F.3d 694 (7th Cir. 1998) 20
United States v. *McElroy*, 910 F.2d 1016 (2d Cir. 1990) 19
United States v. *Park*, 421 U.S. 658 (1975) 17
United States v. *Pomponio*:
528 F.2d 247 (4th Cir. 1975) 17
429 U.S. 10 (1976) 17, 18, 20, 21
United States v. *Rochester*, 898 F.2d 971 (5th Cir. 1990) 19

Cases—Continued: Page

United States v. *Sanders*, 834 F.2d 717 (8th Cir. 1987) 19, 20, 21
United States v. *Sassak*, 881 F.2d 276 (6th Cir. 1989) 19, 20
United States v. *Sawyer*, 85 F.3d 713 (1st Cir. 1996) 10
United States v. *Shelton*, 848 F.2d 1485 (10th Cir. 1988) 10, 11, 13, 14
United States v. *Shotts*, 145 F.3d 1289 (11th Cir. 1998) 16
United States v. *Walker*, 26 F.3d 108 (11th Cir. 1994) 19
United States v. *Walters*, 913 F.2d 388 (7th Cir. 1990) 20

Statutes and rule:

18 U.S.C. 2 2
18 U.S.C. 1341 9
18 U.S.C. 1343 ..... 2, 10
18 U.S.C. 1346 14
18 U.S.C. 2314 2
26 U.S.C. 7206(1) 17
Fed. R. Crim. P. 33 7

Miscellaneous:

2 Josephine R. Potuto et al., *Federal Criminal Jury Instructions* (2d ed. 1985 & Supp. 1993) 22

In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-419

CHARLES SIMPSON CHRISTOPHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 142 F.3d 46. The memorandum opinion of the district court (Pet. App. 26a-37a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 1998. A petition for rehearing was denied on June 11, 1998. Pet. App. 38a. The petition for a writ of certiorari was filed on September 9, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Rhode Island, petitioner was convicted on eleven counts of wire fraud, in violation of

18 U.S.C. 1343 and 2; and ten counts of interstate transportation of stolen goods, in violation of 18 U.S.C. 2314 and 2. The district court sentenced petitioner to a total of 121 months' imprisonment, to be followed by three years' supervised release, and it ordered petitioner to make all reasonable efforts to pay restitution in the amount of $26,700,000. The court of appeals affirmed petitioner's convictions, but modified the restitution order. Pet. App. 1a-25a.

1. The evidence at trial showed that petitioner carried out a fraudulent scheme to acquire two insurance companies—American Universal Insurance Co. (American) and Diamond Benefits Life Insurance Co. (Diamond)—by affirmatively misleading and deceiving state regulators in Rhode Island, Arizona, and California, whose approval was statutorily required for the acquisitions. Petitioner then used approximately $27 million of the companies' monies both to advance his own purposes and then to conceal that misuse of the companies' funds.

a. Petitioner was Vice President of Resolute Holdings, Inc. (Resolute). Resolute had no assets other than $250,000 working capital and was formed solely for the purpose of acquiring insurance companies. In 1987, Resolute sought to acquire American, an insurer headquartered in Rhode Island, and Diamond, an insurer licensed in Arizona and headquartered in California. Gov't C.A. Br. 2. By statute, insurance regulators in each of those States had to approve the acquisitions of the respective companies. *Id.* at 3. Resolute submitted an application, known as a Form A statement, to each State which set out, *inter alia*, Resolute's business plan for the target company and the financial means by which the company would be acquired. Petitioner supplied his attorney with all the information needed to complete the

Forms A, and he personally signed all of the documents submitted to the regulators. *Ibid.*

Petitioner agreed to make much-needed capital contributions to both American and Diamond in the form of promissory notes backed by real estate collateral. For American, petitioner agreed to contribute a $50 million promissory note from Hilltop Developers (Hilltop) secured by Heritage Ranch and Indian Palms, two properties owned by George Reeder.[1] Gov't C.A. Br. 4. For Diamond, petitioner agreed that Hilltop would contribute a $12 million note secured by another Reeder property, Indian Springs. Mydar Business Group, Inc. (Mydar) would also supply a $3 million note to Diamond, which would be secured by a parcel of petitioner's own land known as Big Springs.[2] *Ibid.*

In addition, petitioner arranged for Diamond to receive capital through a transaction with Life Assurance Company of Pennsylvania (LACOP). Gov't C.A. Br. 4. Diamond would receive approximately $29.4 million in cash from LACOP in consideration for assuming approximately $31 million of LACOP's annuity obligations. LACOP would deliver $18 million of the capital at closing, with the remainder to follow several months later. *Ibid.*

At the time Resolute submitted its Forms A, the four properties securing the promissory notes—Heritage Ranch, Indian Palms, Indian Springs, and Big

---

[1] George Reeder, a wealthy real estate developer, was the President of Resolute and the sole shareholder of Hilltop. Pet. App. 3a. Reeder was tried separately on similar charges following petitioner's trial.

[2] Mydar was a shell company owned in name by petitioner's brother. The evidence at trial showed, however, that petitioner had a silent 50 percent interest in the company and directed its activities. Gov't C.A. Br. 4.

Springs—were encumbered by liens totaling well over $25 million. Gov't C.A. Br. 5. Petitioner and Resolute repeatedly represented to the insurance regulators in Rhode Island and Arizona that all liens would be fully paid off by the time Resolute closed its acquisitions of American and Diamond. *Id.* at 5-8. The Rhode Island and Arizona regulators testified that those representations were critical to their approval of the transactions. *Id.* at 7. The concerns regarding the liens also led Rhode Island's regulators to give only conditional approval to Resolute's acquisition of American. The order provided that transfer of ownership would not become final until Resolute issued title insurance policies for Heritage Ranch and Indian Palms indicating full payment of all liens effective as of the closing date. *Id.* at 6-7. It was uncontroverted at trial that the extensive liens on Heritage Ranch, Indian Palms, Indian Springs, and Big Springs were not paid off by May 27, 1988, when the American purchase closed, or by June 14, 1988, when the Diamond purchase closed. *Id.* at 8.

California's regulators initially denied approval of Resolute's acquisition of Diamond, objecting specifically to Resolute's proposal to use part of the LACOP capital to pay Diamond's purchase price. Gov't C.A. Br. 8-9. Accordingly, to secure the approval of the California regulators, petitioner agreed in writing that (1) Resolute would not use any of Diamond's own assets to meet the purchase price, and (2) Resolute would provide Diamond with about $1.3 million in cash to raise the company's capital and surplus. *Id.* at 9. California then issued an order that approved the acquisition of Diamond, but that also set forth petitioner's foregoing promises as conditions precedent to such approval. *Ibid.* The testimony at trial demonstrated that those requirements were

material to California's approval of the acquisition. *Id.* at 9-10.

b. After closing on the Diamond and American acquisitions, petitioner proceeded to use the insurance companies' own funds both to pay off the pre-existing liens on the four properties securing the promissory notes and to pay Diamond's purchase price. First, petitioner caused Diamond to "loan" to Hilltop the $18 million it received from LACOP at closing. Reeder's Windbrook Country Club, which was worth only $5 million, was pledged as collateral for the loan. Gov't C.A. Br. 10. Petitioner also had $3 million transferred out of one of American's accounts. *Id.* at 12-13. Using the newly acquired money, petitioner ordered wire transfers in the amount of $3.8 million to pay Diamond's sellers, in direct violation of California's prohibition on using Diamond's own assets for that purpose. *Id.* at 11. Petitioner also ordered wire transfers of $440,000, $8.7 million, and $5.9 million, respectively, to clear liens on Big Springs, Heritage Ranch, and Indian Palms—all in violation of his representations that the liens would be cleared before closing. *Id.* at 11-13. Finally, petitioner ordered wire transfers of $465,000, $825,000, and $459,000 to Hilltop and to accounts controlled by Reeder. *Id.* at 12. Within ten days of the Diamond closing, petitioner had spent all $18 million received from LACOP, and all $3 million transferred out of American's account as well. Petitioner then lied to Arizona regulators, saying that the $18 million was largely intact and that he was looking for ways to invest it. *Id.* at 12-13.

Petitioner next engaged in two more unauthorized, fraudulent uses of the insurance companies' money. First, petitioner caused American to "loan" $5.4 million to Mydar, providing virtually no collateral in return. Gov't C.A. Br. 14-15. Petitioner used part of that money

to clear additional liens on Big Springs and to boost Diamond's capital, as he had promised the California regulators. *Id.* at 15-16. Mydar never repaid any of the American loan. *Id.* at 16. Second, petitioner arranged for American to purchase certain notes and property. Although the purchase price for those assets was $11.75 million, petitioner directed his attorney to prepare documents setting a falsely inflated price of more than $15 million. *Id.* at 16-17. As a result, petitioner gained access to $3.3 million from American, which he used to pay off remaining liens on Heritage Ranch, Indian Palms, and Indian Springs. *Id.* at 17. Once all the liens on the collateral properties were finally cleared, petitioner submitted to the regulators title insurance policies which had been back-dated to the dates of the American and Diamond closings. *Id.* at 18.

2. a. At trial, petitioner argued, *inter alia*, that all of Resolute's actions were undertaken in reliance upon the advice of competent counsel. Pet. 5. Accordingly, petitioner requested a jury instruction that good-faith reliance upon the advice of counsel is a defense to wire fraud. The district court denied petitioner's request on the ground that petitioner failed to show he apprised counsel of his specific plans for the insurance companies' funds. Pet. 15. The district court instructed the jury that to be found guilty of wire fraud, petitioner must have "knowingly devised or knowingly participated in a scheme or artifice to defraud." 7/18/95 Tr. 169. The court explained to the jury that "[a]n act is done knowingly if done voluntarily and intentionally and not because of mistake or accident or other innocent reason. The purpose of adding the word 'knowingly' is to insure that no one will be convicted for an act done because of mistake or accident or other innocent reason." *Id.* at

170. The court then instructed the jury regarding specific intent:

> The offense [of] wire fraud requires proof of specific intent before the [petitioner] can be found guilty. Specific intent as the term implies means more than the general intent to commit the act. To establish specific intent the Government must prove beyond a reasonable doubt that the [petitioner] intended to defraud, that is, to deceive for the purpose of causing gain to oneself and loss to another.

Id. at 171. The court also instructed the jury on the knowledge element with respect to the interstate transportation of stolen goods counts:

> Knowledge is an essential element * * *. Thus the Government must prove beyond a reasonable doubt that at the time [petitioner] caused the money or security to be transported in interstate commerce he knew they had been stolen, converted or acquired by fraud. The purpose of adding the requirement of knowledge is to insure that no one will be convicted for an act done because of mistake, accident or other innocent reason. Thus [petitioner's] good faith belief that the money was not stolen, converted or acquired by fraud is a complete defense to these charges.

Id. at 175. The jury found petitioner guilty on all counts. Pet. App. 26a.

b. Pursuant to Rule 33 of the Federal Rules of Criminal Procedure, petitioner moved for a new trial. Petitioner contended, *inter alia*, that his wire fraud convictions were legally erroneous and that sufficient evidence existed to warrant a jury instruction concerning the defense of good-faith reliance on advice of counsel. The district court denied petitioner's motion.

Pet. App. 26a-37a. With respect to petitioner's legal sufficiency challenge, the court found that First Circuit precedent, see *United States* v. *Bucuvalas*, 970 F.2d 937 (1992), cert. denied, 507 U.S. 959 (1993), permitted conviction for wire fraud when a defendant defrauds the government of its right effectively to control the granting of licenses or approvals. Pet. App. 29a-32a. The district court also dismissed petitioner's claim that the deceived party must be the same as the party deprived of a property interest, finding that "there appears to be no 'convergence' doctrine firmly established in the First Circuit." *Id.* at 33a. Finally, the district court held that petitioner was not entitled to a jury instruction on the good-faith defense, finding that "the record does not reflect the assertion that [petitioner] told counsel of his intention to utilize the insurance companies' assets to pay off pre-existing loans." *Id.* at 36a.

3. The court of appeals affirmed. Pet. App. 1a-25a. The court first held that the evidence was sufficient to support petitioner's wire fraud convictions. *Id.* at 9a-13a. It found that petitioner had knowingly violated the promises he made to the insurance regulators both to provide lien-free collateral by the closings and not to use Diamond's own assets to pay its purchase price. The court found that the jury could have concluded that petitioner's conduct "was an obvious subterfuge designed to evade" the regulatory requirements (*id.* at 11a), and it deemed petitioner's innocent explanation for the financial transactions "merely part of a shell game [petitioner] devised to hide the nature of the [monetary] transfers." *Id.* at 12a.

The court of appeals also rejected petitioner's two challenges to the legal sufficiency of his wire fraud convictions. Pet. App. 13a-18a. Petitioner had contended, first, that the wire fraud statute requires

convergence—the fraudulent scheme must deceive the same person who is deprived of money or property. The court held that its previous decisions had not espoused a convergence requirement, and that nothing in the broad language of the mail and wire fraud statutes or in this Court's decision in *McNally* v. *United States*, 483 U.S. 350 (1987), required that limitation. Pet. App. 14a-16a.

The court next rejected petitioner's contention that his deceptive scheme did not deprive the state regulators of property within the meaning of *McNally*, which held that 18 U.S.C. 1341 is "limited in scope to the protection of property rights." Pet. App. 13a (quoting *McNally*, 483 U.S. at 360). The court noted that petitioner "intentionally subvert[ed] requirements imposed by state insurance regulators designed to protect the financial health of two insurance companies," and that "[b]y his deceptive representations * * *, [petitioner] siphoned over $26 million from the coffers of the two companies, diverting to his own purposes funds the regulators sought to protect." *Id.* at 17a. "The purpose and result of the fraud," the court held, "plainly related to money." *Ibid.*

Finally, the court held that the district court did not err in refusing to instruct the jury that good-faith reliance on the advice of counsel is a defense to wire fraud. Pet. App. 18a-19a. The court expressed doubt that petitioner made a sufficient showing to justify a good-faith instruction, but held that a separate instruction was unnecessary in any event because the trial court adequately instructed the jury on intent to defraud. *Id.* at 19a.

ARGUMENT

Petitioner argues (Pet. 8-17) that this Court should grant certiorari to resolve conflicts of authority on three separate issues. Those claims are without merit.

1. Petitioner urges (Pet. 11-13) this Court to grant review to resolve the question whether the mail and wire fraud statutes require that the party deceived also be the party deprived of money or property. Petitioner claims (Pet. 11) that two courts of appeals have adopted such a requirement, which he labels the convergence doctrine. See *United States* v. *Lew*, 875 F.2d 219 (9th Cir. 1989); *United States* v. *Shelton*, 848 F.2d 1485 (10th Cir. 1988) (en banc). Further review of that issue is not warranted.

The court of appeals in this case correctly held, as have several other courts, that the wire fraud statute does not require convergence. Pet. App. 16a; see also *United States* v. *Blumeyer*, 114 F.3d 758, 767-768 (8th Cir.), cert. denied, 118 S. Ct. 350 (1997); *United States* v. *Cosentino*, 869 F.2d 301, 307 (7th Cir.), cert. denied, 492 U.S. 908 (1989).[3] As the court below reasoned, "[n]othing in the mail and wire fraud statutes requires that the party deprived of money or property be the same party who is actually deceived." Pet. App. 16a. The statute requires only that the "scheme or artifice" be "to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. 1343.

The decisions claimed by petitioner to apply a convergence requirement rely only on this Court's decision

---

[3] Because the relevant language in the mail and wire fraud statutes is identical, courts apply the same analysis to each provision. See *Carpenter* v. *United States*, 484 U.S. 19, 25 n.6 (1987); *United States* v. *Sawyer*, 85 F.3d 713, 723 (1st Cir. 1996).

in *McNally* as support. See *Lew*, 875 F.2d at 221; *Shelton*, 848 F.2d at 1495-1496. In *McNally*, this Court reversed mail fraud convictions because the relevant indictment alleged only a fraudulent scheme to deprive Kentucky citizens of their intangible right to honest government, and not a scheme to deprive them of money or property. The Court simply "did not focus on whether the person deceived also had to lose money or property." *United States* v. *Evans*, 844 F.2d 36, 39 (2d Cir. 1988).[4]

Petitioner also errs in contending (Pet. 11) that the decision in this case conflicts with decisions of the Ninth and Tenth Circuits. Despite language in those cases that appears to support a convergence requirement, it is anything but clear that either circuit has in fact adopted such a requirement as a general matter.[5] Both cases can

---

[4] The Court did observe that "there was no charge and the jury was not required to find that the Commonwealth itself was defrauded of any money or property." *McNally*, 483 U.S. at 360. Read in context, that simply reflected the Court's conclusion that the jury instructions erroneously permitted a conviction based only on a finding that the defendants had defrauded the citizens of their intangible right to honest government.

[5] Contrary to petitioner's suggestion (Pet. 11-13), the Second Circuit's holdings in *Corcoran* v. *American Plan Corp.*, 886 F.2d 16, 20 (1989), and *United States* v. *Evans*, 844 F.2d 36, 39 (1988), lend no support to his position. The *Corcoran* court expressly found it "unnecessary to answer the general question whether the mail fraud statute requires that the party deceived also be the party injured." 886 F.2d at 20. Similarly, the court in *Evans* concluded that "the case before us today does not require us to decide this general question [whether the person deceived also has to lose money or property]." 844 F.2d at 40; see also *United States* v. *Eisen*, 974 F.2d 246, 252-253 (2d Cir. 1992) (same), cert. denied, 507 U.S. 998 (1993). The Sixth Circuit has also expressly declined to decide this issue. See *United States* v. *Frost*, 125 F.3d 346, 360 (1997), cert. denied, No. 97-1549 (Oct. 5, 1998).

instead be read only as establishing a causation requirement under the federal fraud statutes.

United States v. *Lew*, 875 F.2d 219 (9th Cir. 1989), involved an attorney who filed false statements with the Department of Labor in order to obtain permanent resident status for his immigrant clients. The government charged that by filing false forms the defendant defrauded his clients of their attorney's fees. The court of appeals reversed because it found no evidence that the defendant had deceived his clients, and the jury was not required to make such a finding. *Id.* at 221. Although the Ninth Circuit opined that this Court's decision in *McNally* required proof of an intent "to obtain money or property from the one who is deceived," *Lew*, 875 F.2d at 221, that statement cannot necessarily be read as a general endorsement of a universal convergence requirement. Rather, the court may only have meant to express in the case's factual context the uncontroversial point—made explicit earlier in its decision—that "mail fraud requires a relationship between the falsity and the collection of the money." *Ibid.* Accordingly, because the false statements made to the Department of Labor did not cause the defendant's clients to part with their money—and because the jury was not required alternatively to find that the defendant deceived his clients directly—the defendant's clients could not have been victims of a "scheme or artifice to defraud."[6]

---

[6] Indeed, the First Circuit in this case employed the same reasoning to explain why language in its previous decisions could not be construed as adopting a convergence requirement:

> In the scheme urged by the *McEvoy Travel* plaintiff, the deception actually *followed* the loss. When we reasoned that no mail or wire fraud had occurred because "the only parties

The holding of the Tenth Circuit in *United States* v. *Shelton*, 848 F.2d 1485 (1988) (en banc), is even less clear. In *Shelton*, an elected official received kickbacks from county suppliers and was charged (before *McNally*) with scheming to defraud the citizens of their right to honest government. The indictment also contained allegations suggesting that the county had lost money as a result of the defendant's conduct. See *id.* at 1495. The Tenth Circuit reversed the convictions, however, because the instructions did not require the jury "to find that the victim suffered pecuniary loss"; the instructions defined a scheme to defraud as "a plan to acquire money or property[,] but [did] not require that this money or property come from the victim." *Id.* at 1496 (emphasis omitted). Again, the court may have intended to convey only that the mail fraud statute requires a connection between the fraud and the obtaining of money. The instructions in *Shelton* were faulty because they permitted the jury to convict on the sole ground that the defendant obtained money from suppliers who were themselves perpetrators of the fraudulent scheme. The suppliers' money—the only money received in the scheme—thus could not have been obtained as a result of the deceptive scheme.

---

deceived—[the regulators]—were not deprived of money or property," we were simply making the point that the deception must in fact cause the loss.

* * * * *

As in *McEvoy Travel*, the *Sawyer* panel simply rejected a fraud claim based on misrepresentations that did not cause relevant harm; neither decision required a convergence theory.

Pet. App. 14a-16a (citations omitted).

Significantly, the courts in *Lew* and *Shelton*—to the extent they disagreed with the decisions of other circuits—differed only with respect to their reading of this Court's decision in *McNally*. As numerous circuits have now recognized, Congress supplanted the *McNally* decision one year later by enacting 18 U.S.C. 1346, which defines a scheme to defraud to include the deprivation of honest services. See *Frost*, 125 F.3d at 364 (listing cases); *United States* v. *Brumley*, 116 F.3d 728, 732 (5th Cir.) (en banc) (same), cert. denied, 118 S. Ct. 625 (1997). It is questionable whether the Ninth and Tenth Circuits would continue to apply the rules announced in *Lew* and *Shelton* with respect to post-18 U.S.C. 1346 conduct. Moreover, the enactment of Section 1346 significantly decreases the importance of any purported circuit conflict regarding a convergence requirement. As the extremely limited number of recent cases addressing convergence demonstrates, it is the rare case in which a defendant's allegedly fraudulent conduct fails to satisfy the convergence requirement both with respect to money or property and with respect to the broadly defined "intangible right of honest services." 18 U.S.C. 1346.

2. This Court held in *McNally* that the mail fraud statute is "limited in scope to the protection of property rights" and does not reach "schemes to defraud citizens of their intangible rights to honest and impartial government." 483 U.S. at 355, 360. Petitioner argued unsuccessfully below that *McNally* required reversal of his wire fraud convictions.[7] He now contends (Pet. 8-10) that this Court should grant review to resolve a circuit

---

[7] Because petitioner's wire fraud scheme was completed before the effective date of 18 U.S.C. 1346, that provision is inapplicable to petitioner's conduct. See Pet. App. 13a n.3.

conflict on the question of whether a government approval or license to conduct a business constitutes property within the meaning of *McNally*. That issue is not squarely presented in this case.

The First Circuit affirmed petitioner's wire fraud convictions because it found that "[t]he purpose and result of [petitioner's] fraud plainly related to money." Pet. App. 17a. It noted that "[b]y his deceptive representations and by making a deliberate end run around" the requirements imposed by the insurance regulators designed to protect the financial health of American and Diamond, petitioner "siphoned over $26 million from the coffers of the two companies, diverting to his own purposes funds the regulators sought to protect." *Ibid.* The court further held that "the jury could reasonably have concluded that the scheme was designed to deprive and did in fact deprive the insurance companies of property, placing the policyholders in ultimate jeopardy," and that, "[b]ased on the indictment and instructions, the jury could not have convicted [petitioner] had it not found that his fraudulent representations were a means to take money from American and Diamond and to use those funds for improper purposes concealed from the regulators." *Id.* at 18a. "Such a finding," the court correctly concluded, "places [petitioner's] conduct well within the reach of § 1341." *Ibid.*

Thus, although the issue was briefed below, the First Circuit's decision does not hold that the insurance regulators' approval of the acquisitions itself constituted a property interest within the meaning of *McNally*. Accordingly, even assuming that a genuine conflict of

authority exists on that question,[8] this would be an inappropriate case in which to resolve it.

3. Finally, petitioner contends (Pet. 13-17) that the district court erred in refusing to give the jury a separate instruction on petitioner's good-faith reliance on advice of counsel, and that this Court should grant review to resolve a split of authority concerning when such an instruction must be given. The court of appeals correctly held that a separate instruction was not required in this case, and further review is unwarranted because petitioner was not entitled to a good-faith instruction under the rule followed in any court of appeals.

A defendant generally is entitled to an instruction on his theory of defense if he makes a timely request for the instruction, the evidence supports the instruction, and the instruction correctly states the law. See *Mathews* v. *United States*, 485 U.S. 58, 63 (1988). But a defendant is not entitled to have the jury instructed in his particular words; it is sufficient if the given instructions adequately and correctly cover the substance of the requested instruction. It is thus well settled that the adequacy of the instructions must be evaluated in the context of the

---

[8] As petitioner notes (Pet. 9-10 & nn.5, 6), the Eleventh Circuit recently canvassed the law on this issue and observed that the circuits have reached different conclusions as to whether certain types of business licenses constitute property within the meaning of *McNally*. *United States* v. *Shotts*, 145 F.3d 1289, 1293-1294 (1998). The Eleventh Circuit also observed that most circuits have relied on state law in determining whether a particular type of license constitutes property. *Id.* at 1293-1295. Given that approach, it is "not surprising[]" that the courts of appeals have reached different results. *Id.* at 1294. To the extent, therefore, that any divergent results in the circuits simply reflect the application of different States' laws, there is no genuine conflict of authority that warrants this Court's review.

charge as a whole. See *Estelle* v. *McGuire*, 502 U.S. 62, 72 (1991); *United States* v. *Park*, 421 U.S. 658, 674 (1975); *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973).

This case is controlled by *United States* v. *Pomponio*, 429 U.S. 10 (1976) (per curiam). In *Pomponio*, the defendants were charged with willfully filing false income tax returns, in violation of 26 U.S.C. 7206(1). The court of appeals found that the trial court gave "full and complete" instructions that the jury should convict only if it found that the defendants signed their tax returns knowing them to be false, but it nevertheless held that "[s]ince a good faith belief would tend to negate the elements of willfulness and knowledge, [the defendants] were entitled to [such] an instruction." *United States* v. *Pomponio*, 528 F.2d 247, 249, 250 (4th Cir. 1975).

This Court reversed the judgment of the court of appeals. It held that, because the trial judge had "adequately instructed the jury on willfulness[, a]n additional instruction on good faith was unnecessary." *Pomponio*, 429 U.S. at 13; see also *Cheek* v. *United States*, 498 U.S. 192, 201 (1991) (noting the Court's holding in *Pomponio* that "after instructing the jury on willfulness, an additional instruction on good faith was unnecessary") (internal quotation marks omitted).[9] The same conclusion applies here.

---

[9] In *Cheek*, this Court held that, in a tax evasion case, it is error to say that "a claimed good-faith belief must be objectively reasonable if it is to be considered as possibly negating the Government's evidence purporting to show a defendant's awareness of the legal duty at issue." 498 U.S. at 203. *Cheek*'s holding that a jury should not be instructed that a defendant's belief must be objectively reasonable does not undercut or diminish the holding of *Pomponio* that the standard instructions on knowledge and willfulness are adequate to present the good-faith defense to the jury.

The court of appeals in this case correctly concluded, using reasoning analogous to that in *Pomponio*, that the jury was adequately instructed. On the wire fraud counts, the district court instructed that the jury must find that petitioner knowingly devised or knowingly participated in a scheme to defraud, and that he acted with a specific intent to defraud. 7/18/95 Tr. 169-170. "To establish specific intent," the court instructed, "the Government must prove beyond a reasonable doubt that [petitioner] intended to defraud, that is, to deceive for the purpose of causing gain to oneself and loss to another." *Id.* at 171. The court also instructed the jury that "[a]n act is done knowingly if done voluntarily and intentionally and not because of mistake or accident or other innocent reason." *Id.* at 170. The court then instructed the jury in similar language with respect to the counts charging interstate transportation of stolen goods: "Knowledge is an essential element * * *. Thus the Government must prove beyond a reasonable doubt that at the time [petitioner] caused the money or security to be transported in interstate commerce he knew they had been stolen, converted or acquired by fraud. * * * Thus [petitioner's] good faith belief that the money was not stolen, converted or acquired by fraud is a complete defense to these charges." *Id.* at 175.

The court of appeals correctly found that those instructions sufficiently conveyed petitioner's theory, because the jury could not have returned a guilty verdict on any counts if it had found that petitioner had acted with a good-faith belief in the legality of his conduct. Pet. App. 19a. That holding accords with decisions of the majority of the courts of appeals that have addressed the question. See *United States* v. *Dockray*, 943 F.2d 152, 155 (1st Cir. 1991) (intent to defraud is "essentially the opposite of good faith");

United States v. *McElroy*, 910 F.2d 1016, 1026 (2d Cir. 1990); *United States* v. *Gross*, 961 F.2d 1097, 1102-1103 (3d Cir.), cert. denied, 506 U.S. 965 (1992); *United States* v. *Fowler*, 932 F.2d 306, 317 (4th Cir. 1991); *United States* v. *Rochester*, 898 F.2d 971, 979 (5th Cir. 1990) ("[A] finding of specific intent to deceive categorically excludes a finding of good faith."); *United States* v. *Sassak*, 881 F.2d 276, 280 (6th Cir. 1989); *United States* v. *Brimberry*, 961 F.2d 1286, 1291 (7th Cir. 1992); *United States* v. *Sanders*, 834 F.2d 717, 719 (8th Cir. 1987); *United States* v. *Dorotich*, 900 F.2d 192, 194 (9th Cir. 1990) (holding that where court adequately instructs on specific intent in tax fraud case, failure to give additional instruction on good-faith reliance upon expert advice is not reversible error); *United States* v. *Walker*, 26 F.3d 108, 109-110 (11th Cir. 1994) (per curiam); *United States* v. *Gambler*, 662 F.2d 834, 837 (D.C. Cir. 1981).

Petitioner contends (Pet. App. 13-17) that review is warranted because five circuits have held that, even if the jury is instructed on willfulness and specific intent, an additional good-faith instruction is required in cases in which the evidence supports the instruction. No such conflict exists with respect to four of the five circuits named by petitioner. Petitioner points (Pet. 17) to the Sixth Circuit's holding in *United States* v. *Duncan*, 850 F.2d 1104, 1117 (1988), in which the court reversed false tax return convictions because the district court failed to give a good-faith reliance on advice of counsel instruction. The continued validity of that holding as circuit precedent has been put into considerable doubt by the Sixth Circuit's subsequent holding in *United States* v. *Sassak*, 881 F.2d 276 (1989). In *Sassak*, a defendant convicted of aiding and abetting the preparation of false or fraudulent tax returns requested a jury instruction regarding his good-faith defense. The court first found

that the district court's willfulness charge complied with this Court's holding in *Pomponio*. *Sassak*, 881 F.2d at 280. The court then rejected the defendant's claim with respect to the failure to give the requested good-faith instruction, noting that "the *Pomponio* Court found an additional instruction on good faith belief to be unnecessary." *Ibid.*

Petitioner also claims (Pet. 15, 17) that the decision below is in conflict with the Seventh Circuit's decision in *United States* v. *Walters*, 913 F.2d 388, 391 (1990). The *Walters* decision appears to be, at best, an aberration in the law of that circuit. That court's prior decision in *United States* v. *Kelley*, 864 F.2d 569 (7th Cir.), cert. denied, 493 U.S. 811 (1989), held—relying upon this Court's decision in *Pomponio*—that no additional good-faith instruction was necessary there because "instructions on willfulness necessarily encompass[] [the] theory of good faith reliance on counsel's advice." *Id.* at 573. The Seventh Circuit's decision in *Kelley*—and not its decision in *Walters*—has been followed as the law of that circuit. See, *e.g.*, *United States* v. *Mankarious*, 151 F.3d 694, 708 (7th Cir. 1998) (citing *Kelley* and relying on government's argument that "because the offenses involved willfulness, a good faith instruction was unnecessary"); *United States* v. *Cheek*, 3 F.3d 1057, 1062-1063 (7th Cir. 1993) (relying on *Kelley*), cert. denied, 510 U.S. 1112 (1994); *United States* v. *Brimberry*, 961 F.2d 1286, 1291 (7th Cir. 1992) (same).

Petitioner also claims (Pet. 14 n.8) that the Eighth Circuit's decision in *United States* v. *Casperson*, 773 F.2d 216, 223-224 (1985), is in conflict with the decision below. The continued validity of *Casperson* as circuit precedent is questionable in light of that court's subsequent decision in *United States* v. *Sanders*, 834 F.2d 717, 719 (8th Cir. 1987). The court in *Sanders* rejected the

defendant's appeal regarding the district court's failure to give a good-faith instruction because "[it] is sufficient that the jury was given instructions regarding the need to find specific intent to defraud in order to find the defendant guilty of criminal conversion." *Id.* at 719.

Petitioner also claims (Pet. 15, 17) that the decision below is in conflict with the D.C. Circuit's decision in *United States* v. *DeFries*, 129 F.3d 1293, 1308 (1997) (per curiam). The D.C. Circuit is in fact in agreement with the decision below. In a previous case, *United States* v. *Gambler*, 662 F.2d 834, 837 (D.C. Cir. 1981), that court held clearly that it is unnecessary for a district court to give a good-faith instruction when it has already instructed the jury on the nature of the specific intent required for conviction. The *DeFries* decision did nothing to alter this long-standing rule. The court found the failure to give the good-faith instruction reversible because of the "prosecutor's conduct in closing argument to the jury." *DeFries*, 129 F.3d at 1309. After objecting to a good-faith instruction, the prosecutor informed the jury expressly that the defendant's reliance on his counsel's advice "is not a defense" and also told the jurors that the court would not read any instruction regarding the defendant's reliance on that advice. *Ibid.* The D.C. Circuit, only after "viewing [the jury instructions] in light of the prosecutor's comments," found the failure to give a specific good-faith instruction reversible error. *Id.* at 1309-1310. The court never questioned the validity of its prior decision in *Gambler*.

The one decision which is in conflict with the decision below is that of the Tenth Circuit in *United States* v. *Hopkins*, 744 F.2d 716, 718 (1984) (en banc). The brief opinion fails to discuss—or even note—this Court's decision in *Pomponio*. In light of the trend in the other circuits away from requiring a separate good-faith in-

struction when the jury is already charged on the meaning of specific intent, it is possible that the Tenth Circuit will review its fourteen-year-old decision. In any event, although we believe that *Hopkins* was wrongly decided, there is no need for this Court to grant review, because petitioner did not proffer "evidence sufficient for a reasonable jury to find in his favor," *Mathews*, 485 U.S. at 63, and would therefore not be entitled to a good-faith instruction even under *Hopkins*.

As petitioner himself recognized at trial (see Pet. App. 40a-41a), an advice of counsel instruction is warranted only when there is evidence that:

> (1) before taking action, (2) [the defendant] in good faith sought the advice of an attorney whom he considered competent, (3) for the purpose of securing advice on the lawfulness of his possible future conduct, (4) and made a full and accurate report to his attorney of all material facts which the defendant knew, (5) and acted strictly in accordance with the advice of his attorney who had been given a full report.

Liss v. *United States*, 915 F.2d 287, 291 (7th Cir. 1990); see 2 Josephine R. Potuto et al., *Federal Criminal Jury Instructions* § 24.08 (2d ed. 1985 & Supp. 1993).

The district court expressly found that the trial evidence failed to support an instruction concerning good-faith reliance on advice of counsel. To the contrary, that court reasoned, the evidence showed only that petitioner's "attorneys were acting in good faith at the direction of the client," rather than the other way around.[10] 7/18/95 Tr. 17. On appeal, the government

---

[10] In denying petitioner's motion for a new trial, the district court elaborated as follows:

carefully detailed petitioner's numerous misrepresentations to his attorneys, his failure to make complete disclosure of the relevant facts to any attorney, and his failure to seek legal advice in advance of taking unilateral action. See Gov't C.A. Br. 48-56. Although the court of appeals declined to reach the issue in light of its conclusion that the instructions given were adequate, the court expressed "doubt that [petitioner] made a sufficient showing of good faith reliance on counsel to justify a finding in his favor on that basis." Pet. App. 19a.

Thus, because petitioner would not have been entitled to a good-faith instruction under the rule applied in any court of appeals, the conflict he alleges does not warrant this Court's review.

> According to the evidence presented at trial, [petitioner] never made full disclosure to his counsel. While the record reflects that counsel prepared much of the paperwork, the record does not reflect the assertion that the defendant told counsel of his intention to utilize the insurance companies' assets to pay off pre-existing loans. Moreover the record shows that [petitioner] alone instructed Fleet Bank to disburse the money according to his direction, and thereby completed the fraudulent scheme on his own accord and not in good faith reliance on the advice of counsel.

Pet. App. 36a-37a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
JAMES K. ROBINSON
Assistant Attorney General
LISA SIMOTAS
Attorney

NOVEMBER 1998